STATE OF MICHIGAN

COURT OF APPEALS

JAMES DURALL, JR.,

Plaintiff-Appellant,

V

HOME-OWNERS INSURANCE COMPANY,

Defendant-Appellee.

UNPUBLISHED
March 29, 2011

No. 293910
Genesee Circuit Court
LC No. 08-088948-CK

Before: SHAPIRO, P.J., and SAAD and K. F. KELLY, JJ.

SHAPIRO, J. (*dissenting*).

Because I conclude that there is a question of fact whether defendant complied with its statutory duty under MCL 500.2006(3) to provide plaintiff with written notice of what would constitute a satisfactory proof of loss, I respectfully dissent.

Plaintiff's home burned to the ground on November 1, 2007. Plaintiff immediately notified defendant Home-Owners Insurance Company of the loss. The very next day, November 2, 2007, plaintiff met with defendant's adjustor. On that date, the adjustor provided plaintiff with an inventory form and directed him to identify the personal property lost in the fire. It is undisputed that, at that meeting, the adjustor did not provide plaintiff with a proof of loss form or any writing that set forth what constituted a sufficient proof of loss. Plaintiff promptly completed the inventory and provided it to the adjustor.

Shortly after the fire, defendant received a copy of the fire department report which stated that the entire value of the house had been lost. Similarly, the Property Loss Notice prepared by plaintiff's insurance agent stated that the property was a "total loss – down to the ground." Defendant's investigator inspected the insured property on November 5 and submitted a report to defendant on the same date. The report stated that "[t]he house was totally destroyed and was down in the basement. The only structural material remaining was a portion of the chimney." Photographs showing the total destruction of the structure were included in the report.

Also on November 5, plaintiff gave a 28-page tape-recorded interview with an investigator representing defendant. During that interview, plaintiff answered all the investigator's questions and signed a consent form allowing the investigator to enter the insured premises. He also told the investigator that "the only thing standing [after the fire] is the chimney." The investigator made no mention of a proof of loss form during the interview and

did not provide plaintiff with a proof of loss form or any writing that set forth what constituted a sufficient proof of loss.

On November 10, plaintiff signed a release permitting defendant to obtain his employment, financial, utility and insurance records. By November 12, defendant had obtained a full appraisal on the insured property by an appraiser of its choosing.

On November 30, the adjustor mailed the inventory form back to plaintiff with a letter directing him to provide additional information regarding the age and replacement cost of the items and to sign a certification that the inventory was "representative of the loss we experienced on the above stated date of claim." The letter did not contain a proof of loss form or any writing that set forth what constituted a sufficient proof of loss. Plaintiff signed the inventory form and returned it on December 3, 2007.

The November 30 letter was sent by defendant to plaintiff in care of his sister at her address because plaintiff's home had completely burned down and no mail could be delivered there, as the mail receptacle had been on the front of the house and not in a separate location. Notably, the letter had originally been sent to plaintiff's destroyed home and, according to defendant's records, was returned to defendant by the post office no later than November 26. Defendant called plaintiff on November 29 and obtained his new mailing address. Defendant's internal e-mail demonstrates that defendant's adjustor was aware, no later than November 26, that no mail could be received at the insured address.

On December 3, the outside adjustor sent a second report to defendant. It included the appraisal report, plaintiff's handwritten inventory list, and a 17-page detailed estimate of all losses both personal and building that had been prepared by the adjustor.

MCL 500.2006(3) states in mandatory terms: "An insurer shall specify in writing the materials that constitute a satisfactory proof of loss not later than 30 days after receipt of a claim unless the claim is settled within 30 days."

Defendant asserts that on November 2, 2007, it sent a letter to plaintiff at the insured address providing a proof of loss form that set forth what constituted a satisfactory proof of loss. Plaintiff asserts that he never received this letter and argues that it was not sent. Other than an unsigned file copy of the letter, defendant does not offer any proofs that it was sent, such as a certified mail receipt, an affidavit from the person who mailed it, or internal documentation confirming that it was mailed. Moreover, since plaintiff's home was burned to the ground and had no outside mail receptacle, it was impossible for the post office to deliver mail there. As noted above, defendant's records contain evidence that the late-November letter containing the inventory that defendant sent to the insured address was returned to defendant's office by the post office. It is reasonable to infer that, if the November 2, 2007 letter had in fact been sent, the file would similarly contain some reference to it having been returned by the post office. The absence of any such notation given the impossibility of mail delivery to the address, therefore, allows for a reasonable inference that the letter was not sent. This would certainly be consistent with plaintiff's testimony and the lack of any evidence of the mailing, let alone receipt.

In an examination under oath on March 14, 2008, plaintiff testified that he had not received a letter from defendant asking him for proof of loss. When asked why he did not submit a proof of loss he testified, "I think I would have filled one of these out, because I was asked to fill [the inventory] out [and did so]. And if I had been asked when [that] was asked for, you would have got them both. Obviously, somebody didn't do their job and it wasn't me, cause I did what I was asked . . . I didn't receive this type at all, no [indicating a proof of loss form provided at his examination by defendant's attorney]."

In support of its motion for summary disposition, defendant has proffered an affidavit from the first adjustor assigned to plaintiff's claim. This affidavit states that, on November 2, 2007, when he provided plaintiff with a check in partial payment to plaintiff, he had plaintiff sign a property advance/non-waiver agreement and that this document included the language: "This is not a PROOF OF LOSS as required by the policy. A PROOF OF LOSS must still be submitted to the company within 60 days of the date of loss stated above." Notably, however, the adjustor does not aver that on that date he gave plaintiff a form proof of loss to complete or any writing stating what constituted a satisfactory proof of loss.[1] Thus, his affidavit is not proof that defendant complied with MCL 500.2006(3).

Defendant proffers a similar affidavit from a second claims representative as to the December 20, 2007 property advance/non-waiver agreement she had plaintiff sign when providing him with a second partial payment for his losses. This claims representative also fails to aver that she provided plaintiff with a form proof of loss or any other writing stating what constituted a satisfactory proof of loss. Thus, like the first affidavit, the second fails to provide proof that defendant complied with MCL 500.2006(3).[2]

Plaintiff challenges defendant's claim that it complied with its duty to send a proof of loss form and/or instructions and argues that this failure, as well as other actions by defendant, estops defendant from seeking to enforce the contractual provision mandating the submission of a satisfactory proof of loss within 60 days. The application of MCL 500.2006(3) in this setting arose in *Dellar v Frankenmuth Mut Ins Co*, 173 Mich App 138; 433 NW2d 380 (1988). In that case, the plaintiff asserted that the insurer had not provided the proof of loss form within 30 days and so was estopped from relying on the 60-day requirement as against the insured. The court in *Dellar* did not reach this issue, noting that to do so, it would have to reconcile two possibly conflicting statutes: MCL 500.2006(3) and 500.2832.[3] MCL 500.2006(3), as previously noted, requires the insurer to provide the relevant form or information in writing within 30 days after the loss. The other statute at issue, MCL 500.2832, set forth mandatory contract language, including a requirement that the insured file the proof of loss within 30 days of the loss and a provision stating that doing so was a condition precedent to a suit upon the contract.

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[1] While orally-provided information would not satisfy the statute, it is worth noting that the affiant also does not aver that any discussion about the proof of loss requirement took place.

[2] Like the first affiant, this second affiant also does not aver that any discussion about the proof of loss requirement took place.

[3] The *Dellar* court did find that the insurer was estopped on other grounds, citing *inter alia*, *Struble v National Liberty Ins Co of America*, 252 Mich 566; 233 NW 417 (1930).

There is a significant difference between the instant case and *Dellar*. When *Dellar* was decided, the requirement that the proof of loss be filed within 60 days was statutorily required by MCL 500.2832. Since *Dellar*, however, MCL 500.2832 has been repealed and replaced by MCL 500.2833, which does not contain such a requirement, thus eliminating the insured's statutory duty to file the proof of loss within 60 days. Indeed, there is no longer any statutory penalty for failing to file a proof of loss, other than that the insurer's time period in which to pay benefits is not triggered until the filing occurs. By contrast, the Legislature has not repealed MCL 500.2006(3) and the insurer retains a statutory duty to "specify in writing the materials that constitute a satisfactory proof of loss not later than 30 days after receipt of a claim."

While the *Dellar* Court hesitated to address whether an insurer's lack of compliance with MCL 500.2006(3) estopped an insured from relying on an insured's statutory duty under MCL 500.2832, we, unlike the *Dellar* court, are not faced with the issue of harmonizing two statutes. We need merely determine the relationship of defendant's statutory duty under MCL 500.20906(3) to plaintiff's contractual duty. It appears that the majority would allow an insurer to enforce a *contractual* deadline the insured violated even where the insurer violated a *statutory* deadline imposed by the Legislature to assure that the insured could meet his contractual deadline. In my view, this renders the statute nugatory and violates the long-standing principle that where a contract and statute cannot be harmonized, it is the contract that must give way.[4] Moreover, allowing such conduct could have unintended results, as it would provide an incentive to an insurer to violate statutory duties where doing so could induce a contractual violation by its insured upon which it can then deny coverage and obtain a windfall.

The majority holds for defendant given that plaintiff had a duty to read his policy and may not claim that he was unaware of the contract requirement that he timely file a proof of loss.[5] However, that general principle does not settle the question whether defendant may rely on that requirement to deny coverage if it itself violated the statutory requirement to "specify in writing the materials that constitute a satisfactory proof of loss not later than 30 days after receipt of a claim."

Defendant also suggests, and the majority agrees, that by providing plaintiff with a copy of the insurance policy at the time he purchased coverage, it met its duty because the policy itself set forth what constituted a proof of claim. While I question whether providing a copy of the policy at the time of sale rather than within 30 days after the loss would meet the requirements of MCL 500.2602(3), the majority errs in concluding that plaintiff was *ever* provided with the policy, either before the loss or within 30 days thereafter. Indeed, by accepting defendant's assertion that it provided plaintiff with a copy of the policy at the time of sale, the majority is

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[4] Insurance contracts that are in conflict with a statute are void as against public policy, although the courts, where reasonably possible will harmonize the contract with the statute. *Cruz v State Farm*, 466 Mich 588, 600-601; 648 NW2d 591 (2002).

[5] The majority relies on *Auto-Owners Ins Co v Zimmerman*, 162 Mich App 459; 412 NW2d 925 (1987) and *Zaremba Equip, Inc v Harco Nat'l Ins Co*, 280 Mich App 16; 761 NW2d 151 (2008). I would agree that those cases stand for the general principle that an insured is held to the standard of having read the policy though I note that neither case occurred in the factual setting of a late-filed proof of loss.

assuming the facts most favorable to the moving, rather than non-moving, party. Plaintiff testified that he was never provided with a copy of the policy until well after the proof of loss deadline. Defendant does not proffer any testimony from plaintiff that he was given the policy at the time he purchased the insurance or at any time prior to the due date for the proof of loss. In addition, defendant does not provide any other proofs that it provided plaintiff with a copy of the policy prior to the fire or within 30 days thereafter. Defendant's statement of facts asserts that "[w]hen the policy was issued on September 10, 2007, a copy of the policy was mailed to Mr. Durall." However, no citation to the record is provided in support of this claimed fact, despite MCR 7.212(D)(3)(b)'s requirement that the statement of facts include "specific page references to the transcript, the pleadings or other document or paper filed with the trial court, to support the appellee's assertions." Nevertheless, the majority seems to have accepted this unproven assertion by the moving party as conclusively true.

Plaintiff testified that he did not receive information required by MCL 500.2006(3). As set forth above, there is other factual support for plaintiff's assertion that defendant failed to comply. Defendant asserts that it did comply and proffers an unsigned office copy of a letter as its proof. There is clearly a question of fact as to this issue that can only be resolved by the factfinder.

I would, therefore, reverse the grant of summary disposition and remand for trial, at which the jury would first determine whether defendant "specif[ied] in writing the materials that constitute a satisfactory proof of loss not later than 30 days after receipt of [plaintiff's] claim." If the trier of fact determines that defendant did so, then judgment for defendant should be entered. If the trier of fact determines that defendant did not do so, then the jury should determine the remaining issues of fact.

/s/ Douglas B. Shapiro